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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

AUSTIN J. TOBIN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit reversing respondent's conviction for willful refusal to supply records to a committee of Congress.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, pp. 27–40) is not yet reported. The opinion of the district court is reported at 195 F. Supp. 588.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 1962. A petition for rehearing was denied

on July 2, 1962. On July 27, 1962, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including August 30, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the issuance of a subpoena for documents relevant to the internal workings of the Port of New York Authority, an agency created by interstate compact, was authorized by a resolution empowering the House Judiciary Committee "to conduct full and complete investigations and studies relating to * * * the activities and operations of interstate compacts" and "to require by subpoena * * * the production of such * * * documents, as it deems necessary."

CONSTITUTIONAL PROVISION, STATUTE AND CONGRESSIONAL MATERIAL INVOLVED

Article 1, section 10, clause 3 of the United States Constitution provides:

> No State shall, without the consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Section 121 of the Legislative Reorganization Act of 1946, 60 Stat. 812, 822–829 provides in pertinent part:

* * * * *

> (b) Rule XI of the Rules of the House of Representatives is amended to read as follows:

RULE XI

POWERS AND DUTIES OF COMMITTEES

(1) All proposed legislation, messages, petitions, and other matters relating to the subjects listed under the standing committees named below shall be referred to such committees, respectively: * * *

* * * * * *

(1) Committee on the Judiciary.

* * * * * *

18. Interstate Compacts generally.

* * * * * *

House Resolution 27, 86th Congress, 1st Sess., agreed to January 27, 1959 (105 Cong. Rec. 1207) provided:

Resolved, That the Committee on the Judiciary, acting as a whole or by subcommittee, is authorized and directed to conduct full and complete investigations and studies relating to the following matters coming within the jurisdiction of the committee, namely—

(1) relating to the adminstration and operation of general immigration and nationality laws and the resettlement of refugees, including such activities of the Intergovernmental Committee for European Migration which affect immigration in the United States; or involving violation of the immigration laws of the United States through abuse of private relief legislation;

(2) involving claims, both public and private, against the United States;

(3) involving the operation and administration of national penal institutions, including personnel and inmates therein;

(4) relating to judicial proceedings and the administration of Federal courts and personnel thereof, including local courts in Territories and possessions;

(5) relating to the operation and administration of the antitrust laws, including the Sherman Act, the Clayton Act, and the Federal Trade Commission Act; and

(6) involving the operation and administration of Federal statutes, rules and regulations relating to crime and criminal procedure and

(7) involving the operation and adminstration of the Submerged Lands Act and the Outer Continental Shelf Lands Act: *Provided,* That the committee shall not undertake any investigation of any subject which is being investigated by any other committee of the House.

The committee shall report to the House (or the Clerk of the House if the House is not in session) as soon as practicable during the present Congress the results of its investigation and study, together with such recommendations as its deems advisable.

For the purpose of carrying out this resolution the committee or subcommittee is authorized to sit and act during the present Congress at such times and places within or without the United States, whether the House is in session, has recessed, or has adjourned, to hold such hearings and to require by subpoena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memorandums, papers, and documents, as it deems necessary. Subpenas may be issued under the signature of

> the chairman of the committee or any member of the committee designated by him, and may be served by any person designated by such chairman or member.

House Resolution 530, 86th Cong., 2d Sess., agreed to June 1, 1960 (106 Cong. Rec. 11593–11594), provided:

> *Resolved,* That House Resolution 27, Eighty-sixth Congress, is amended by striking out the period at the end of clause (7) on page 2 and inserting "; and" and by inserting after clause (7) on page 2 the following clause: "(8) involving the activities and operations of interstate compacts;".

STATEMENT

Respondent, the executive director of the Port of New York Authority, refused to produce certain records subpoenaed by a subcommittee of the House Committee on the Judiciary. In doing so, he relied, *inter alia,* upon an asserted immunity of the Authority from having to respond to any investigation undertaken with a view toward amending or repealing Congress' consent to the interstate compact which established the Authority and upon an alleged lack of authority on the part of the committee under the controlling House resolution. It is out of this event and these contentions that the present case arises.

1. THE POWERS OF THE HOUSE JUDICIARY COMMITTEE

Section 121 of the Legislative Reorganization Act of 1946, 60 Stat. 822–829, defined the jurisdiction of the Standing Committees of the House. It granted to the Judiciary Committee authority over nineteen subjects, including "interstate compacts generally."

60 Stat. 826–827, Rule XI(1)(l). In 1959 the Judiciary Committee acting as a whole or by subcommittee was authorized and directed "to conduct full and complete investigations and studies" relating to seven subjects, not including interstate compacts. To implement this grant of power, the committee or subcommittee was authorized "to hold such hearings and to require by subpoena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memorandums, papers, and documents, as it deems necessary." (R. 135–136; H. Res. 27, 86th Cong., *supra,* p. 4.) On June 1, 1960, the House amended this resolution and extended the investigatory and subpoena power to matters "involving the activities and operations of interstate compacts" (R. 136; H. Res. 530, 86th Cong., 2d Sess.; *supra,* p. 5).

It was stipulated that the power of the Judiciary Committee was properly delegated to the Subcommittee.

2. THE PORT OF NEW YORK AUTHORITY

The Port of New York Authority is an agency established in 1921 and 1922 by compacts between New York and New Jersey. The consent of Congress was given to these compacts in order to:

> * * * promote and facilitate commerce between the States and between the States and foreign nations and provide better and cheaper transportation of property and aid in providing better postal, military, and other services of value to the Nation * * *[1]

[1] 42 Stat. 822, R. 126.

In each of the Joint Resolutions granting the consent of Congress to the interstate compacts, Congress provided that "the right to alter, amend, or repeal this resolution is hereby expressly reserved" (R. 126, 134).

The Authority operates twenty-one terminal and transportation facilities; six inter-state bridges and tunnels; four air terminals and a heliport; six marine terminal areas; two truck terminals; a motor truck terminal for rail freight; and a bus terminal (R. 287).

3. THE INVESTIGATION

In March of 1960, the Chairman of the House Judiciary Committee, Emanuel Celler, directed a staff study of the "activities and operations" of the Port of New York Authority under the 1921 and 1922 compacts, including review of its major operations. In furtherance of the study, on March 11, 1960, he requested respondent, the Executive Director of the Authority, to make certain of its files available for examination by committee staff members (R. 108, 137–139).[2] On March 15 and 16, the committee staff investigators were permitted by the Authority to inspect its documents of public record but no others (R. 260–267).

[2] The request was to examine the files pertaining to the following activities from January 1, 1956 to date:

"Budgeting, financing, and auditing operations.

"Real estate acquisitions and operations.

"Contracts and contracting procedures.

"Revenue bond negotiations.

"Personnel and administrative files on a need-to-know basis.

"Agenda and minutes of commission and executive board meetings relating to the policies and operation of the port authority."

On May 17, 1960, a resolution was introduced by the committee chairman to extend to interstate compacts the investigatory and subpoena power granted to the Judiciary Committee by House Resolution 27. This resolution was referred to the Committee on Rules (H. Res. 530, 86th Cong., 2d Sess., 106 Cong. Rec. 10483), which unanimously recommended its passage. On June 1, 1960, the resolution was debated briefly on the floor. Congressman Brown of the Rules Committee stated (106 Cong. Rec. 11593):

> I have been assured by both the ranking member of the [Judiciary] Committee * * * on our [Republican] side and by the chairman * * * that the committee does not expect to use or abuse this power through a great many investigations but, instead, to look into one particular State's compact where, under present laws and under the compact, there is no control or knowledge of just how a great many public funds are being expended. * * *
>
> [T]he Committee on Rules has had explained to it the need for this investigation and the good that can come from it.

Congressman Smith of the Rules Committee explained that H. Res. 27 had inadvertently excluded authority for the committee over interstate compacts and pointed out that under the pending resolution the Judiciary Committee was "given blanket authority to investigate" interstate compacts. The resolution was passed unanimously (106 Cong. Rec. 11593–11594).

On June 8, 1960, subcommittee No. 5 of the Judiciary Committee voted to conduct a full inquiry into

the activities and operations of the Port Authority and requested the Port Authority to permit the Committee staff to examine its documents (R. 108–109, 140–142). Respondent objected to such an examination, but agreed to discuss the matter further with staff members of the committee (R. 142–150, 109–110). Subpoenas were issued when a meeting failed to resolve the issues (R. 110).[3]

On June 29, 1962, the return date of the subpoena, respondent appeared before the committee. The

[3] The subpoenas called for the production of the following documents (documents included within brackets were produced) (R. 172–173):

"(1) [All by-laws, organization manuals, rules and regulations;]

"(2) [Annual financial reports;] internal financial reports, including budgetary analyses, post-closing trial balances, and internal audits; and management and financial reports prepared by outside consultants;

"(3) All agenda [and minutes] of meetings of the board of commissioners and of its committees; all reports to the commissioners by members of the executive staff;

"(4) All communications in the files of the Port of New York Authority and in the files of any of its officers or employees including correspondence, inter-office and other memoranda and reports relating to:

"(a) the negotiation, execution and performance of construction contracts; negotiation, execution and performance of insurance contracts, policies and arrangements; and negotiation, execution and performance of public relations contracts, policies and arrangements;

"(b) the acquisition, transfer and leasing of real estate;

"(c) the negotiation and issuance of revenue bonds;

"(d) the policies of the Authority with respect to the development of rail transportation."

The subpoenas included documents dated from January 1, 1946 to June 15, 1960 (R. 174).

Chairman advised him of the subject matter of the investigation (R. 106–113), stating that Congress has responsibility over the compact establishing the Port Authority under the "compact" clause of the Constitution and has responsibility over many of the Authority's operations under such other powers as those over interstate commerce and national defense (R. 112). The purpose of the investigation, the Chairman concluded, was "to determine whether legislation is warranted with respect to congressional consent to the port authority compacts in order more adequately to protect and preserve the manifold Federal interests involved" (R. 112–113).

Although respondent stipulated that he had custody and control over the records, he would agree only to produce documents similar to those which the Port Authority had theretofore made available for inspection (R. 176–180) and refused to produce any others (R. 215). The committee rejected respondent's objections to the power of the committee (H. Rept. No. 2117, 86th Cong., 2d Sess.; Exhibit 1; R. 89–258). On June 19, 1960, the House adopted a resolution, H. Res. 606, 86th Cong., 2d Sess., certifying the committee's report to the United States Attorney for the institution of contempt proceedings. 106 Cong. Rec. 17278–17313.[4]

[4] On February 9, 1961, at the next Congress, the House passed H. Res. 56, 87th Cong., 1st Sess., 107 Cong. Rec. 2003, containing identical language to H. Res. 27, as amended by H. Res. 530, and again gave the Judiciary Committee authority to "conduct full and complete investigations and studies relating to * * * activities and operations of interstate compacts."

4. RESPONDENT'S CONVICTION

Prior to respondent's trial for contempt it was stipulated that "upon entry of a final judgment of conviction against defendant Tobin herein, the Port Authority will produce upon the request of said subcommittee all of the papers * * * held by the court to be pertinent to the matter under inquiry" (R. 4). The district court rejected each of respondent's challenges to the authority of the Judiciary Committee in a careful and extensive opinion reported at 195 F. Supp. 588. Respondent was sentenced to imprisonment for thirty days and fined $100, the sentence to be suspended if respondent complies with the subpoena (R. 340–341).

5. THE DECISION OF THE COURT OF APPEALS

The court of appeals reversed respondent's conviction, holding that the Judiciary Committee was not authorized to subpoena the documents which respondent had refused to produce.

The court held that both the House resolution and the Chairman's statement of the purpose of the investigation limited the Committee's area of inquiry to information relevant to an exercise of Congress' power to "alter, amend, or repeal" its consent to an interstate compact. The existence of such a power, the court decided, presented a difficult and important constitutional question which should be avoided if possible. Avoiding the constitutional question was possible by adopting a narrow construction of the Committee's authorizing resolution. A grant of power "to conduct full and complete investigations * * * relating to * * * the activities and operations

of interstate compacts" was, the court held, too general a grant of authority to justify an investigation in depth into highly specific and detailed aspects of the Port Authority's activities. Its internal operations, information bearing on "the *why* of Authority activity," were found to be outside the scope of the Subcommittee's authority to investigate (App. A, p. 39). Since it was only this type of document which respondent had refused to furnish, the court reversed the conviction.

REASONS FOR GRANTING THE WRIT

This Court should review the decision of the Court of Appeals for the District of Columbia Circuit for three related reasons. First, the fact that the court below rejected the view of the committee's authority adopted by the House in citing respondent for contempt is in itself sufficient to warrant certiorari, *United States* v. *Rumely*, 345 U.S. 41, 42. Second, the decision of the court of appeals establishes a rule of continuing importance which imposes special burdens upon every investigation undertaken to determine whether Congress' consent to an interstate compact should be altered, amended, or repealed. Third, the decision below casts doubt upon the efficacy of any general delegation of investigative power to a Congressional committee. We deal with each reason in turn.

1. The court of appeals placed an interpretation upon the resolution authorizing the Port of New York Authority investigation which is altogether different from the view of the Judiciary Committee and of the

House of Representatives when it voted to cite respondent for contempt. Certiorari was granted on this ground in *United States* v. *Rumely*, 344 U.S. 812, as the Court explained in its opinion on the merits (345 U.S. 41, 42).

> Since the Court of Appeals thus took a view of the committee's authority contrary to that adopted by the House in citing Rumely for contempt, we granted certiorari. * * *

For the same reason certiorari should be granted in the present case.

A decision of the Court of Appeals for the District of Columbia Circuit avoiding a House resolution to cite a witness for contempt of Congress upon the ground that the House of Representatives misconstrued its own prior resolutions authorizing the investigation, raises far more important problems than a single ruling upon an ordinary question of statutory interpretation. Since the decision relates to the resolutions and internal proceedings of the House of the Representatives itself, an area in which the House has peculiar knowledge and a sensitive interest, the issue has a special claim to the attention of this Court.

Pursuing an investigation in the face of a restrictive interpretation of the authorizing resolution is not simply a matter of obtaining a new resolution removing the alleged ambiguity. There is the pressure of other legislative business. The Rules Committee, which has jurisdiction over such resolutions, and also the House itself, are naturally and justifiably reluctant to acquiesce in a restrictive ruling until they have secured the most authoritative guidance concern-

ing the alleged defects in a resolution which they had supposed to be adequate to require the witness to comply with the Committee's request. This is especially true where the decision of the lower court, although technically confined to the interpretation of a single resolution, raises serious questions concerning the drafting of other investigatory resolutions and, if followed, would hamper the conduct of many Congressional investigations.

2. The court below is the tribunal with appellate jurisdiction over the district in which the subpoena powers of Congress are normally enforced; consequently its decisions upon the subject have unusual significance. The decision in the present case is not just a narrow construction of a single *ad hoc* resolution in a context not likely to be repeated. The decision construes general terms in a broad and continuing authorization of investigation resolution. It will affect the power of Congress to conduct other investigations into the operation of interstate compacts, a field of growing importance, and its impact seems bound to spread to other areas.

A. To explain the basis for these conclusions it is necessary to examine more closely the grounds of the decision below.

The resolutions which the House deemed to authorize the subpoena, when read together, give the Judiciary Committee the power "to conduct full and complete investigations and studies relating to * * * the activities and operations of interstate compacts" (*supra*, pp. 3, 5). In aid of this power "to conduct *full* and *complete* investigations" the resolution also grants the Committee authority "to require by subpoena

* * * the production of such books, records, correspondence, memorandums, papers, and documents, as it deems necessary" (*supra*, p. 4).

The court below limited the committee's coercive power to the study of what the Authority had actually done without inquiring into how it had functioned internally, or how or why it had reached its decisions. The Subcommittee's inquiries, the court said, were too "specific" and too "expansive"; the resolutions should not be read to authorize an investigation "as deep and penetrating as the one attempted here" (App. A, pp. 37, 39). In terms of common sense and textual analysis it is hard to see how a "full and complete investigation" could avoid being "penetrating and deep". A truly "full and complete investigation" would necessarily consider not only the steps taken, but also the motives, the alternatives considered, the responsibility of various individuals within the organization, the waste or efficiency of its internal machinery, the decision-making process and a host of similar considerations. Certainly, the committee would not make a "full and complete investigation" of the handling of claims under the Federal Tort Claims Act (28 U.S.C. 1346(b), 2674) if it contented itself with listing the claims presented, the claims settled, the claims litigated and the judgment, without raising such questions as who authorized the settlements, whether alternatives were considered, and whether there was favoritism or corruption. Nothing in the resolution suggests that the critical phrase has one meaning in relation to claims (par. 2) and another as applied to the activities and

operations of interstate compacts (par. 8). And, just as the court cut down the words "full and complete" by qualifications having no textual or linguistic foundation, so the court, in effect, interpolated its own words of limitation into the paragraph specifically dealing with subpoenas, confining it to "such *published* books, *public* records, correspondence, *external* memorandums, *external* papers, and *public* documents, as it deems necessary."

The proceedings in the House, far from laying a foundation for this construction, are persuasive evidence that the Congress intended to give the committee power to subpoena the very papers in dispute. When the committee first requested the Authority to furnish its files relating to such matters as budgeting, financing, auditing and real estate transactions, the Authority offered to make available all its public records and also information about its external activities, but it refused to furnish the internal files requested. At this stage, H. Res. 27, which defined the jurisdiction of the Judiciary Committee to conduct investigations, contained no reference to interstate compacts. The Committee then sought the adoption of H. Res. 530, which would add the power to investigate "the activities and operations of interstate compacts." The impasse, which led the Committee to seek the resolution, was confined to the kind of information which the court below denied. It would be incredible if the Rules Committee, which reported the resolution, was not apprised of the nature of the impasse, for the House was told that "the Committee on Rules has had explained to it the need for this investigation and the

good that can come from it." The Committee made a favorable report. The House was also informed that the Judiciary Committee planned "to look into one particular State's compact where, under present laws and under the compact, there is no control or knowledge of just how a great many public funds are being expended," but that the resolution granted "blanket authority to investigate" within the committee's jurisdiction. 106 Cong. Rec. 11593–11594.

The only fair inference is that the Judiciary Committee sought, the Rules Committee approved, and the House granted, authority to subpoena the files that the Authority had withheld. Although a subsequent vote of the House to cite respondent for contempt cannot make contemptuous respondent's refusal to comply with the committee's demand, unless the demand was authorized when made (*United States* v. *Rumely*, 345 U.S. 41, 48), its vote to cite respondent for contempt is persuasive evidence of the original intent.

In rejecting this view the court of appeals first predicated that the authority for the subpoena must be traced to the powers of Congress under the interstate compacts clause of the Constitution.[5] It held that there was grave constitutional doubt as to the power of Congress to "alter, amend, or repeal" its consent to an interstate compact, even one that projects continuing operations, and that there were therefore similar doubts as to its power to investigate in order to determine the necessity of exercising the former power. The court went on to reason that any

[5] Although in discussing the scope and importance of the decision below we shall assume the correctness of the Court's

ambiguity in the scope of a Congressional resolution should be resolved in favor of the witness if such a determination would obviate the necessity of deciding a constitutional question. The court then concluded that the resolutions which "authorized and directed" the Judiciary Committee "to conduct full and complete investigations and studies relating to" and "involving the activities and operations of interstate compacts" did not empower the Committee to conduct investigations as "specific" as "expansive" and "as deep and as penetrating as the one attempted here." In particular, the court distinguished between docu-

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construction of the subject matter of the enabling resolution and of the Chairman's statement of the purpose of the investigation, we believe that the court was in error in both regards. We therefore reserve the right to question each of these determinations if certiorari is granted in this case.

In particular, in regard to the subject matter of the resolution, the Judiciary Committee's power to investigate an agency created by compact is not limited by the scope of the compact clause but extends to the full range of powers that Congress might bring to bear on such agencies under any clause (*e.g.*, commerce, defense, or customs).

Under the Legislative Reorganization Act of 1946, Congress established a series of standing committees in each House to consider in the first instance all proposed legislation and other matters relating to certain subjects. The division of labor under this statute is by legislative subject matter—interstate compacts generally and interstate commerce generally being two of the subjects so delegated—and not by particular constitutional power. There is no basis for assuming that consideration of a particular subject matter must be exercised within the particular bounds of one particular constitutional power. That would not be in accord with the aims of the Legislative Reorganization Act, one of which was to avoid the necessity of establishing special investigatory committees. See S. Rept. No. 1011, 79th Cong., 2d Sess.

ments disclosing what the Port authority has done and documents revealing "why."

B. The reasoning of the court below is not merely inadequate to support its restrictive interpretation in this particular case. As stated above, the decision lays down a doctrine which will seriously embarrass any congressional committee attempting to conduct a thorough investigation into the operations of a multi-state agency under the compacts clause of the Constitution. For the doctrine teaches that any witness in such an investigation who can present a plausible argument for narrowing the authorizing resolution in any respect is free to withhold the information from the Congress. This lesson follows, we think inescapably, from the three significant respects in which the decision below differs from the conventional narrowing of congressional statutes or resolutions to avoid constitutional doubts.

First, the court's doubts as to constitutionality do not relate to some narrow facet of a wider investigation, nor to an effort by a committee, overriding a claim of privilege, to question a particular witness or see particular documents. The doubts relate to the existence of any Congressional power to concern itself with legislation altering, amending or revoking its consent to any interstate compact and will be present in every facet of every investigation of agencies like the Port Authority so long as Congress is unwilling to abandon its assertion of this power.

Second, the court of appeals has not denied the committee the power to investigate one area of subject matter; it has forbidden the committee to conduct

as "specific" and "expansive" an investigation as the one undertaken. The court found doubt not as to whether the ends of the investigation were authorized but as to whether the authorization extended to the particular documents requested. Congress may, by a single resolution, make clear its intention to include a particular area of investigation within its authorization. But no resolution can resolve all ambiguity as to the intended depth of an investigation or as to whether particular questions or documents were meant to be made available to an investigating committee.

Third, there is no relation between the wording of the resolution and the court's constitutional doubts. The fundamental basis for the doctrine of interpretation to avoid constitutional doubts is that the Congress must be presumed, in the absence of contrary evidence, to have wished to avoid close constitutional questions and to have recognized the importance of the interests underlying the alleged constitutional right. Accordingly, the rule is applicable only in situations where the words and legislative history will fairly bear opposing interpretations and one construction will plainly conform to the Constitution while the other may violate it. *Crowell* v. *Benson,* 285 U.S. 22, 62; *United States* v. *Rumely,* 345 U.S. 41, 45; *International Association of Machinists* v. *Street,* 367 U.S. 740, 749–750. In the instant case, even if one assume that there is ambiguity in the apparently clear resolution, the resolution will not be constitutional under one interpretation and of doubtful constitutionality under the other. The doubts discussed at length by the court are equally applicable to every portion of this or any

other resolution authorizing the investigation of interstate compacts to determine whether the consent of Congress should, in that particular case, be altered, amended or revoked. The resolution is not saved by one interpretation where it might fail under another.

The result is that the line which the court drew between documents that the committee presumably can subpoena and documents that it cannot—the line between the "what" and the "why" of the Authority's activities—bears no rational relation to the court's constitutional doubts. Since the doubts relate to the existence of any power to alter, amend or revoke, even though the right is expressly reserved in the original consent, they are just as applicable to "what" as to "why", and just as applicable to an investigation that is general as to one that is "specific", and to one that is shallow rather than "penetrating" and "deep".

The conclusion seems unavoidable that the House Judiciary Committee cannot compel a witness to respond whenever a plausible objection can be raised to its authority under the resolution to demand documents or answers to questions bearing upon the need for legislation under the compacts clause modifying or withdrawing previous consent. Indeed, the doctrine can hardly be limited to the present resolution. Since every resolution, like every statute—no matter how carefully drawn—has "twilight zones" of debatable meaning requiring interpretation, the decision of the court of appeals would impose a permanent disability on the powers of any committee undertaking an investigation into the desirability of exercising reserved powers under the "compact" clause to "alter,

amend, or repeal" Congressional consent to continuing operations under an interstate compact.

C. The importance of clarifying the scope of the Judiciary Committee's authority to conduct investigations into the functioning of agencies established by interstate compacts reaches well beyond the investigation of the Port of New York Authority. Since 1921 Congress has passed thirty-nine statutes or joint resolutions granting consent to interstate compacts either establishing agencies to operate interstate facilities or authorizing States to undertake continuing regulation of matters committed to the federal government by the Constitution (see App. B. p. 41). There is an increasing tendency to create agencies by interstate compact as a means for solving regional problems in such fields as transportation, conservation, flood control, and utilization of nuclear energy. During the 86th Congress, consent was granted to creation of the Wabash Valley Commission (Public Law 86–375, 73 Stat. 694); a New York-New Jersey transportation planning agency (Public Law 86–302, 73 Stat. 575); and the Washington Metropolitan Area Transit Commission (Public Law 86–794, 74 Stat. 1031). During the 87th Congress, consent has been granted to creation of the Delaware River Basin Commission (Public Law 87–328, 75 Stat. 688) and the Southern Interstate Nuclear Board (Public Law 87–563, 76 Stat. 249). In addition, pending resolutions would authorize a Delaware River and Bay Authority (H.J. Res. 783, 87th Cong., 2d Sess. (108 Cong. Rec. 14592, daily ed.))* a multistate authority to construct and operate a vast

* Passed by the House of Representatives on August 6, 1962.

rail transportation system in eight eastern seaboard states (H.J. Res. 732, 87th Cong., 2d Sess. (108 Cong. Rec. 9259, daily ed., June 7, 1962); H.J. Res. 747, 87th Cong., 2d Sess. (108 Cong. Rec. 9753, daily ed., June 14, 1962)); and a Potomac River Fisheries Commission (H.J. Res. 659, 87th Cong., 2d Sess. (108 Cong. Rec. 3701, daily ed., March 13, 1962)).[1]

All of the consent resolutions enacted during the 86th and 87th Congresses, as well as the proposed resolutions mentioned above, contain the customary reservation of the Congressional right to alter, amend, or repeal the consent which has been granted. Indeed such a reservation is thought essential when consent is given to the continuing operations of an interstate agency, the precise nature of whose activities cannot be envisaged in full detail at the time consent is given. In addition, these consents reserve to Congress or its committees the right to require disclosure and the furnishing of such information and data by the interstate compact agency as Congress or its committees deem appropriate.

The court of appeals has cast serious doubt upon the validity of both of these Congressional reservations of power. The right of Congress to alter, amend, or repeal consent to an interstate compact has been held to be in serious constitutional doubt. The right of a committee of Congress to require an agency created by interstate compact to produce information relating to its functions is the very issue which the court below held to raise constitutional doubts requiring a narrow construction of any House resolution

[1] Passed by the House of Representatives on August 6, 1962 (108 Cong Rec. 14589, daily ed.).

or, presumably, any reservation in a compact dealing with these matters. Congress should not be forced to consider resolutions proposing similar restrictions in new consent resolutions and to pass upon the desirability of exercising such reserved powers while its investigative powers are hobbled by a rule of construction which requires any conceivable ambiguity in the scope of the authorization of the investigation to be resolved against the power of the investigating committee.

3. The reasoning of the decision below raises still more pervasive problems in the drafting of authorizing resolutions for, and the conduct of, Congressional investigations. The investigatory authority of a committee in relation to a defined subject must ordinarily be expressed in general terms; otherwise there is too much risk that the investigation will take an unexpected turn, or develop a new lead, only to find that material evidence is not subject to subpoena. To attempt to cover every particular kind of evidence in specific detail would demand more than human foresight. To require a committee to go back to the House or Senate every time the pertinent information had not been specifically identified would hamper the investigations and clog the calendars of both chambers.

Yet the heart of the opinion below appears to be the court's unwillingness to give effect to the general language in an authorizing resolution, language which is obviously broad enough to cover the demand, because the resolution does not show on its face that the House considered that specific line of inquiry.

Thus, the court repeatedly emphasized the fact that "the authority thus granted to the Committee is couched in general terms" (App. A, p. 37), and it concluded that before one could find that Congress authorized the committee to investigate specifically the internal functioning of the Authority, the Congress must be found to "have spelled out this intention in words more explicit than the general terms found in the authorizing resolutions" (App. A, p. 38). This reasoning throws doubt upon the adequacy of any resolution expressed in general terms when a witness raises a constitutional doubt about his obligation to answer questions in a more specific field.

The restrictive interpretation adopted by the court of appeals, as we have shown, has no foundation in the words of the resolution or other indicia of Congressional intent. Few litigated questions of interpretation are so plainly susceptible of only one answer as the issue presented in this case. In such a situation the doctrine that a statute or resolution should be construed to avoid constitutional doubts cannot be applied without severely intruding upon the power of Congress to conduct its intended investigations into business and regulatory activities, up to constitutional limits. With the passage of time and further litigation perhaps some of the problems raised by the decision below would be satisfactorily resolved. A sensitive regard for the functioning of a co-equal branch of government, however, would seem to suggest that Congress should not be left to bear the onus of delay and uncertainty without a decision on the merits from this Court.

CONCLUSION

For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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Assistant Attorney General.
BEATRICE ROSENBERG,
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Attorneys.

AUGUST 1962.

APPENDIX A

United States Court of Appeals for the District of Columbia Circuit

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No. 16604

AUSTIN J. TOBIN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Decided June 6, 1962

Mr. Thomas E. Dewey, with whom Messrs. Everett I. Willis, Lino A. Graglia and Sidney Goldstein were on the brief, for appellant.

Mr. William Hitz, Assistant United States Attorney, with whom Messrs. David C. Acheson, United States Attorney, and Nathan J. Paulson, Assistant United States Attorney, were on the brief, for appellee. Mr. Charles T. Duncan, Principal Assistant United States Attorney, also entered an appearance for appellee.

Mr. Daniel M. Cohen, of the bar of the Court of Appeals of New York, pro hac vice, by special leave of court, with whom Mr. Jerome M. Alper was on the brief, for the State of New York, as amicus curiae, urging reversal.

Mr. Theodore I. Botter, of the bar of the Supreme Court of New Jersey, pro hac vice, by special leave of court, for the State of New Jersey as amicus curiae. Mr. William F. Tompkins was on the brief for the State of New Jersey, as amicus curiae, urging reversal.

Mr. J. Raymond Clark filed a brief on behalf of the New York Chamber of Commerce, as amicus curiae, urging reversal.

Mr. Jerome M. Alper filed a brief on behalf of the State of Delaware, as amicus curiae, urging reversal.

Mr. Jerome M. Alper filed a brief on behalf of the State of Alabama, et al., as amici curiae, urging reversal.

Before WILBUR K. MILLER, CHIEF JUDGE, and DANAHER and BASTIAN, Circuit Judges.

BASTIAN, Circuit Judge: Austin J. Tobin, the Executive Director of the Port of New York Authority, was charged by information and convicted in the District Court of criminal contempt of Congress, under 2 U.S.C. § 192, for refusing to produce certain documents called for by a subpoena issued by Subcommittee No. 5 of the Committee on the Judiciary of the United States House of Representatives.

The Port of New York Authority is a bi-state agency established in 1921 and 1922 by compacts between the States of New York and New Jersey to provide for the efficient administration of the New York harbor, which is divided geographically between the two states. Pursuant to the compact clause of the Constitution,[1] Congress consented to the compacts but expressly retained, among other matters, "the right to alter, amend or repeal" its resolutions of approval.

[1] Article I, Section 10-3, of the Constitution reads in pertinent part: "No State shall, without the consent of Congress * * * enter into any agreement or compact with another State * * *."

Over the years, the Port Authority has been remarkably successful in achieving its goals. As of 1959, it had investments of nearly one billion dollars and gross annual operating revenue in excess of one hundred million dollars.

In February of 1960, the Judiciary Committee initiated an investigation of the Authority on an informal basis. The Authority cooperated with the Committee investigators except as to disclosing certain documents alleged to relate exclusively to the internal administration of the Authority. After this refusal events moved swiftly to a climax.

On June 1, 1960, the Chairman of the Committee obtained from the House subpoena power in connection with matters "involving the activities and operations of interstate compacts." What little floor discussion there was preceding this grant of subpoena power was not very enlightening; it certainly provided no lucid analysis of what was soon to follow. On June 8, 1960, Subcommittee No. 5 of the Judiciary Committee instituted a formal inquiry into the Authority.

Appellant conferred with the Board of Commissioners of the Authority, as well as with the Governors of both New York and New Jersey, and their consensus was that the investigation being attempted was too broad to be valid. The Subcommittee was informed of their objections and the reasons therefor. Discounting these objections, the Subcommittee issued the subpoena in question. Appellant requested postponement of the return date of the subpoena in order to give the Governors an opportunity to meet with the Subcommittee and discuss their objections, but the Subcommittee refused the postponement.

After being denied the opportunity to appear before the Subcommittee, the Governors wrote identical let-

ters to their respective representatives on the Board of Commissioners of the Authority, instructing them to direct appellant not to comply with the subpoena. The Board of Commissioners so directed appellant on June 27, 1960. Two days later, on June 29, 1960, the Subcommittee met to receive the return of the subpoena. It was against this background that appellant refused to comply with the demands of the subpoena[2] and was ruled in default by the Chairman of the Subcommittee. Thereafter, the Subcommittee recom-

[2] Appellant's refusal to comply with the subpoena was only partial. The subpoena as issued is reported here in its entirety, the bracketed portions representing those documents actually produced, the unbracketed portions representing those that were refused:

"(1) [All by-laws, organization manuals, rules and regulations;]

"(2) [Annual financial reports;] internal financial reports, including budgetary analyses, post-closing trial balances, and internal audits; and management and financial reports prepared by outside consultants;

"(3) All agenda [and minutes] of meetings of the Board of Commissioners and of its committees; all reports to the Commissioners by members of the executive staff;

"(4) All communications in the files of the Port of New York Authority and in the files of any of its officers or employees including correspondents, interoffice and other memoranda and reports relating to:

"(a) the negotiation, execution and performance of construction contracts; negotiation, execution and performance of insurance contracts, policies and arrangements; and negotiation, execution and performance of public relations contracts, policies and arrangements;

"(b) the acquisition, transfer and leasing of real estate;

"(c) the negotiation and issuance of revenue bonds;

"(d) the policies of the Authority with respect to the development of rail transportation."

The demands of the subpoena encompassed the period from January 1, 1946, to June 15, 1960.

mended to the full Committee that appellant be cited by the House for contempt. This recommendation was adopted by the Judiciary Committee, two members dissenting, and subsequently by the House itself. Charged by information, appellant waived his right to jury trial and was convicted of contempt of Congress by District Judge Youngdahl.[3]

Appellant advances several arguments in support of the position that his conviction cannot stand. For present purposes, to illustrate the constitutional issues we would have to decide in order to affirm the conviction, we list but two of his arguments:

1. That Congress does not have the power, under the compact clause of the Constitution, to "alter, amend or repeal" its consent to an interstate compact, which was the stated purpose of the Subcommittee's investigation.

2. That "the subpoena issued by the Subcommittee, demanding documents relating to the internal administration of the Port Authority which the Governors of New York and New Jersey ordered appellant not to produce, [was] an unconstitutional invasion of powers reserved to the States under the Tenth Amendment to the Constitution."

Because of the view we take of this case, appellant's first contention demands some elaboration. In granting its consent Congress can attach certain binding conditions, not only to its consent to the admission of a new state into the Union,[4] but also to its consent to the formation of an interstate compact.[5] However, the vital condition precedent to the validity

[3] For a scholarly analysis of the factual setting of this case, we refer to the detailed delineation found in the opinion of District Judge Youngdahl 195 F. Supp. 588 (1961).

[4] *United States* v. *Sandoval*, 231 U.S. 28 (1913).

[5] *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959).

of any such attached condition is that it be constitutional. If Congress does not have the power under the Constitution, then it cannot confer such power upon itself by way of a legislative fiat imposed as a condition to the granting of its consent.[8]

In the present case, therefore, Congress's express reservation of the right "to alter, amend or repeal" its initial consent to the creation of the Authority is meaningless unless Congress has the power under the Constitution "to alter, amend or repeal" its consent to an interstate compact. The compact clause of the Constitution does not specifically confer such power upon Congress. No case has been cited to us, nor have we been able to find any case through our own research, holding that Congress has such constitutional power. Nor do we find any to the contrary. Since no such power appears expressly in the compact, any holding that it exists and that Congress possesses it must be predicated on the conclusion that it exists as an implied power.

We have addressed ourselves at some length to this issue in order to show the gravity of passing even upon only one of the constitutional questions posed by this case. Moreover, in view of appellant's argument that the plenary powers specified in and by the Constitution are more than sufficient to enable Congress to protect, supervise and preserve all federal interests affected by the existence of interstate compacts, we are even less inclined to reach the constitutional issues involved here. We have no way of knowing what ramifications would result from a holding that Congress has the implied constitutional power "to alter, amend or repeal" its consent to an interstate compact. Certainly, in view of the number and variety of interstate compacts in effect today, such a holding would

[8] Cf. *Coyle* v. *Smith*, 221 U.S. 559 (1911).

stir up an air of uncertainty in those areas of our national life presently affected by the existence of these compacts. No doubt the suspicion of even potential impermanency would be damaging to the very concept of interstate compacts.

Appellant argues that congressional consent becomes irrevocable once it is given under the compact clause since Congress thereby removes the constitutional ban against the formation of interstate compacts and thus, to that extent, restores the states to the inherent sovereignty they enjoyed prior to the adoption of the Constitution. This does not mean that once congressional consent is obtained the particular compact becomes a law unto itself, immune by reason of its autonomy from future congressional supervision. It simply means that the states are restored to that much of their original sovereignty as would permit them to enter into compacts with each other. To this extent and to this extent alone, does congressional consent restore them to sovereignty—sovereign in the narrow sense of being free to conclude an interstate compact, not sovereign in the broad sense of being free of the Constitution.

Accordingly, if a particular compact happens to be operational in nature (as exemplified by the compact creating the Authority) as opposed to one static in nature (as exemplified by an agreement to settle a disputed boundary line, an act which necessarily dies at the moment of its birth), Congress is not without power to control the conduct of the former. Under our system of government the Constitution is paramount, and the Constitution gives to Congress certain plenary powers, as for example those in the field of interstate commerce and that of national defense. With the choice of acting pursuant to any or all of these plenary powers continuously available to it,

Congress has at its disposal abundant authority to supervise and regulate the activities of operational compacts in such a way as to insure that no violence is done by these compacts to more compelling federal concerns.

Appellant argues, in short, that Congress can adequately protect every interest that needs such protection because of the existence of an operational compact without, in doing so, being forced to the extremity of rescinding its consent under the compact clause, an action which appellant contends Congress has no constitutional power to perform.

Appellant's assertion in this respect is not unpersuasive, since a holding that Congress has the constitutional power to "alter, amend or repeal" its consent under the compact clause can hardly be stated as a proposition of universal applicability. A line marking the boundary between two states, initially drawn by such states acting pursuant to an interstate compact, could hardly be erased at some later date by Congress's enactment of hindsight legislation purporting to repeal its consent to the compact by which such boundary was initially determined. See the discussion in *Hinderlider* v. *La Plata River Co.*, 304 U.S. 92 (1938) and cases cited therein.

In other words, appellant seeks to distinguish the ways in which congressional control over an operational compact may be properly exercised: he argues that control undertaken pursuant to the plenary powers to licit, whereas control attempted in the sense of withdrawing consent under the compact clause is illicit.

Lest this distinction be looked upon as nothing more than a quibble, a mere academic distinction of a nicety too refined to be noticed outside an ivory tower, it must be remembered that this case comes to us by way

of a criminal conviction.[7] It must be borne in mind, therefore, that appellant is entitled to all of the safeguards which our system of criminal jurisprudence assures him, not the least of which is that he not be convicted in a general rush to vindicate matters actually collateral to the crime for which he stands accused. Indeed, the present case is a classic example of how this very danger arises.

Appellant is no criminal and no one seriously considers him one. He stands before us convicted of crime merely because no method has been provided for testing the merits of his contentions save that of a prosecution for contempt of Congress. It is truly unfortunate that his choice was so restricted as to the presentation of his case, for it places us in the posture of being asked to answer broad questions of civil law within the framework of reviewing a criminal conviction. Undoubtedly the questions presented to us properly demand resolution, but we should not and cannot permit this appeal for answers to blind us to our duty of administering criminal justice according to traditional concepts. It must be remembered that what we decide in this case will be precedent for another, and far too often has the rashness of today begotten the regrets of tomorrow to induce us to tread unsanctioned byways of criminal adjudication merely.

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[7] Regardless of what Congress might have done or how Congress might have approached the instant problem, we are bound by what Congress in fact did do. Since the jurisdiction of the Subcommittee that issued the subpoena in question is derived from the compact clause, and since the stated purpose of the Subcommittee's investigation was to determine whether Congress should "alter, amend, or repeal" its consent to the compacts that established the Authority, the distinction under discussion not only is not a play on words—it is an essential dividing line between appellant's guilt or innocence of criminal conduct.

because the setting of a particular appeal suggests the expediency of such a course. In short, we decide this case as we would any other criminal appeal. It is with these considerations in mind, therefore, that we approach the disposition of the present controversy.

A contempt of Congress prosecution is not the most practical method of inducing courts to answer broad questions broadly. Especially is this so when the answers sought necessarily demand far-reaching constitutional adjudications. To avoid such constitutional holdings is our duty, particularly in the area of the right of Congress to inform itself. *United States* v. *Rumely*, 345 U.S. 41 (1953). Consequently, when Congress authorizes a committee to conduct an investigation, the courts have adopted the policy of construing such resolutions of authority narrowly, in order to obviate the necessity of passing on serious constitutional questions. *Watkins* v. *United States*, 354 U.S. 178 (1957); *Brewster* v. *United States*, 103 U.S. App. D.C. 147, 255 F. 2d 899, *cert. denied*, 358 U.S. 842 (1958).

Accordingly, the first issue we must decide is whether Congress gave the Judiciary Committee of the House (and therefore its Subcommittee No. 5) authority sufficient to permit the Subcommittee to conduct the sweeping investigation undertaken in the instant case. The authority pointed to as validating the present investigation was conferred by the House upon the Judiciary Committee in piecemeal fashion:

The Legislative Reorganization Act of 1946 granted to the Judiciary Committee authority over nineteen subjects, including "interstate compacts generally." 60 Stat. 812, 826–827; Rule XI(1). In 1959 the Committee was given subpoena power to conduct "full and complete investigations and studies relating to [cer-

tain stated matters] coming within the jurisdiction of the Committee." H. Res. 27, 86th Cong., 1st Sess. (1959). As this last grant of authority did not encompass interstate compacts, it was amended on June 1, 1960, to include "the activities and operations of interstate compacts." H. Res. 530, 86th Cong., 2d Sess (1960). Putting these resolutions of authority together, we find that the Committee was given jurisdiction over "interstate compacts generally," and the power "to conduct full and complete investigations and studies relating to * * * the activities and operations of interstate compacts."

The authority thus granted to the Committee is couched in general terms. In the present case, the Committee stretched these general terms in order to justify about as specific an investigation of the Port of New York Authority as can be envisaged. We are inclined to believe the House did not intend these general terms to be stretched quite so far. While it is true that the Judiciary Committee for many years did have specific jurisdiction over "interstate compacts generally," its traditional activity with respect to this jurisdiction was entirely foreign to an investigation of the kind and scope attempted here. So in this respect the present case is the antithesis of the Supreme Court's decision in *Barenblatt*,[8] where the particular committee's authorization was found in the long history of congressional acquiescence in that committee's work.

In the present case, the very fact that Congress had never before attempted such an expansive investigation of an interstate compact agency—an investigation, by its very nature, sure to provoke the serious and difficult constitutional questions involved here—leads to the conclusion that if Congress had intended

[8] *Barenblatt* v. *United States*, 360 U.S. 109 (1959).

the Judiciary Committee to conduct such a novel investigation it would have spelled out this intention in words more explicit than the general terms found in the authorizing resolutions under consideration.[9] In any event, general terms are usually susceptible of differing interpretations. And so, in view of the fact that we consider it our duty to avoid, if possible, constitutional adjudication, we read these authorizing resolutions to mean that the Judiciary Committee was empowered to conduct an investigation calling for documents relating to actual "activities and operations" of the Authority rather than for all of the administrative communications, internal memoranda, and other intra-Authority documents demanded by the subpoena in question. *Brewster* v. *United States, supra.* Cf. *United States* v. *Rumely, supra.* And see *United States* v. *Kamin,* 136 F. Supp. 791 (Mass. 1956). Therefore, we think the Subcommittee's investigative authority, as thus construed, was exhausted by the information actually tendered by appellant in compliance with the subpoena, for such information adequately disclosed all that the Authority had done in the areas under inquiry. The information refused to the Subcommittee related only to the *why* of Au-

[9] In arriving at our conclusion in this respect, we have been particularly impressed by the absence of any truly enlightening or informative floor discussion in Congress at the time the instant authority was sought by and granted to the Judiciary Committee concerning the use in depth that was expected to be made of it. This want of explanation is especially striking in light of the fact that no such massive investigation of a compact agency had ever been initiated by Congress before. We think the respect to which Congress is legitimately entitled supports the conclusion that it would not signal its approval of a decision of such magnitude in the delicate area of Federal-State relationship without a clearer expression of its understanding of what it was doing than is reflected by the instant case (106 Cong. Rec. 11593–11594).

thority activity and, consequently, was outside the scope of the Subcommittee's authority to investigate.[10]

We feel inclined to add a few words in conclusion. If Congress should adopt a resolution which in express terms authorizes and empowers the committee and its duly authorized Subcommittee to initiate an investigation of the Port of New York Authority as deep and as penetrating as the one attempted here, a challenge of the congressional power so to provide would of course present constitutional issues which we should have to meet and decide. Therefore, we emphasize that all we are saying here is that a due regard for the responsibility of administering justice prompts us to avoid serious constitutional adjudications until such time as Congress clearly manifests its intention of putting such a decisional burden upon us.

Especially do we say this in view of the unusual nature of the present case, where we are asked to decide essentially civil and jurisdictional issues at the same time that we establish criminal precedent. The conflicting quality inherent in a request of this nature is not particularly conducive to the giving of any satisfactory answer, no matter what the answer should prove to be. Should this controversy be resumed, it is hoped that Congress will first give sympathetic consideration to Judge Youngdahl's eloquent plea:

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[10] That the power of a subcommittee having general jurisdiction over a subject must nonetheless be specifically spelled out in particular instances has been made abundantly clear in many expressions by the Supreme Court. The contempt of Congress cases, in whatever posture the problem be posed, underscore this thought. [See for example *Russell* v. *United States*, and related cases, decided by the Supreme Court May 21, 1962.] Basically the proposition may be simply stated. There can be no "constructive" offenses. *United States* v. *Resnick*, 299 U.S. 207, 210 (1936).

During the House debate on the contempt citation, the Committee inserted in the Congressional Record a memorandum purporting to show that declaratory judgment procedures were not an available means for procuring judicial resolution of the basic issues in dispute in this case. Although this question is not before the Court, it does feel that if contempt is, indeed, the only existing method, Congress should consider creating a method of allowing these issues to be settled by declaratory judgment. Even though it may be constitutional to put a man to guessing how a court will rule on difficult questions like those raised in good faith in this suit, what is constitutional is not necessarily most desirable. Especially where the contest is between different governmental units, the representative of one unit in conflict with another should not have to risk jail to vindicate his constituency's rights. Moreover, to raise these issues in the context of a contempt case is to force the courts to decide many questions that are not really relevant to the underlying problem of accommodating the interest of two sovereigns. 195 F. Supp. at 616–17.

Reversed.

APPENDIX B

TABLE OF INTERSTATE COMPACTS

I. Acts of Congress granting consent to interstate compacts establishing agencies or commissions to operate interstate facilities

(1) Joint resolution of August 23, 1921 (42 Stat. 174–180). New York and New Jersey. Consent to agreement of April 30, 1921 (under provisions of New York Laws 1921, ch. 154; and New Jersey Laws 1921, ch. 151) for the development of the Port of New York Authority.

(2) Joint resolution of July 1, 1922 (42 Stat. 822–826). New York and New Jersey. (Consent to supplemental agreement for development of port of New York, contained in New York Laws 1922, ch. 43; and New Jersey Laws 1922, ch. 9.)

(3) Joint resolution of February 16, 1928 (45 Stat. 120–128). New York and Vermont. Consent "to enter into the agreement or compact executed by the commissioners" appointed by said States for the creation of the Lake Champlain Bridge Commission.

(4) Act of June 14, 1932 (47 Stat. 308–317). Pennsylvania and New Jersey. Consent to compact signed July 1, 1931, relating to operation and maintenance of bridge over Delaware River between Philadelphia and Camden. (See act of July 17, 1952, below.)

(5) Joint resolution of August 27, 1935 (49 Stat. 932–938). New York, New Jersey and Connecticut. Consent to compact between New York and New Jer-

sey (to which Connecticut may be admitted) establishing an interstate sanitation commission for abatement of pollution of waters of the signatory States. (Amended August 3, 1956 (70 Stat. 966).)

(6) Act of August 30, 1935 (49 Stat. 1058–1064, section 9). Pennsylvania and New Jersey. Consent to an agreement executed December 18–19, 1934, creating a Delaware River Joint Toll Bridge Commission for administration, operation, and maintenance, of bridges north of the Pennsylvania Railroad bridge between Morrisville and Trenton and for the planning for additional bridges. (Supplemental compact consented to by Congress March 31, 1952, 66 Stat. 28–32.)

(7) Act of August 4, 1947 (61 Stat. 752–756). Pennsylvania and New Jersey. Consent to compact concerning the construction and operation of toll bridges by the Delaware River Joint Toll Bridge Commission.

(8) Act of October 26, 1949 (63 Stat. 930–932). Tennessee and Missouri. Consent to compact concerning Tennessee-Missouri Bridge Commission.

(9) Joint resolution of August 31, 1950 (64 Stat. 568–571). Missouri and Illinois. Consent to compact creating the Bistate Development Agency and Bistate Metropolitan District.

(10) Act of July 17, 1952 (66 Stat. 738–747). New Jersey and Pennsylvania. Consent to supplemental compact concerning Delaware River Port Authority. (See Act of June 14, 1932, above.)

(11) Act of July 17, 1952 (66 Stat. 747–752). New Jersey and Pennsylvania. Consent to supplemental compact authorizing Delaware River Joint Commission to construct, finance, operate, maintain and own a vehicular tunnel across the Delaware River. (See Act of June 14, 1932, above.)

(12) Act of August 12, 1953 (67 Stat. 541–557). New Jersey and New York. Consent to Waterfront Commission Compact.

(13) Act of August 30, 1954 (68 Stat. 982–985). Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont. Consent to any two or more of the States named to enter into compact relative to higher education, and creating the New England Board of Higher Education.

(14) Joint Resolution of September 21, 1959 (73 Stat. 575–582; Public Law 86–302). New York and New Jersey. Consent to compact for the creation of the New York-New Jersey Transportation Agency empowered to prepare long range plan for the integration and improvement of transit facilities within and between New York and New Jersey.

(15) Joint Resolution of September 21, 1959 (73 Stat. 582; Public Law 86–303). Approval of additional powers conferred upon Missouri-Illinois Bi-State Development Agency. (See joint resolution of August 31, 1950 above.)

(16) Act of September 23, 1959 (73 Stat. 694–699; Public Law 86–375). Illinois and Indiana. Consent to compact creating Wabash Valley Interstate Commission, empowered to promote the balanced development of Wabash Valley and to recommend integrated plans for the conservation and proper utilization of natural resources in the Valley.

(17) Joint Resolution of September 15, 1960 (74 Stat. 1031–1051; Public Law 86–794). Maryland, Virginia, and the District of Columbia. Consent to compact for the creation of the Washington Metropolitan Area Transit Commission, having jurisdiction over the regulation and improvement of transit and the alleviation of traffic congestion within the Metropolitan District. (Commission is authorized to issue

certificates of public convenience and necessity and to prescribe fares, regulations and practices and to approve mergers, consolidations and acquisitions.)

(18) Joint Resolution of September 27, 1961 (75 Stat. 688–715; Public Law 87–328). Delaware, New Jersey, New York, Pennsylvania, and the United States. Consent to the Delaware River Basin Compact, creating a regional agency by intergovernmental compact for the conservation, utilization, development, management, and control of the water and related natural resources of the Delaware River Basin (Delaware River Basin Commission).

(19) Act of July 31, 1962 (76 Stat. 249–254; Public Law 87–563). Consent to Southern Interstate Nuclear Compact creating Southern Interstate Nuclear Board to encourage the development and use of nuclear energy facilities.

II. Acts of Congress granting consent to interstate compacts or to negotiation of compacts for the continuing regulation of subjects committed to the federal government by the Constitution

(1) Act of December 21, 1928 (45 Stat. 1064, sec. 13). Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming for the development of the Colorado River.

(2) [1] Act of April 25, 1936 (49 Stat. 1239–1242). Tobacco-producting States. Consent to negotiation of compacts for regulating production of or commerce in any one or more kinds of tobacco. Compacts in conformity with the Virginia Tobacco Control Act of 1936 shall become effective without further ratification by Congress; but Congress may at any time withdraw its consent to any agreement entered into under the act.

[1] No state action taken under this compact.

(3) Joint resolution of June 8, 1936 (49 Stat. 1490). Maine, New York, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, Pennsylvania, West Virginia, Kentucky, Indiana, Illinois, Tennessee, and Ohio. Consent to negotiation by any two or more of said States of agreements for conserving, improving, or preventing pollution of streams having an interstate drainage.

(4) Act of June 22, 1936 (49 Stat. 1571–1572, sec. 4). General. Consent to compacts between any two or more States for flood control upon interstate streams—any compact to be subject to further ratification by Congress unless all work thereunder is to be performed by the War Department.

(5) Act of April 2, 1938 (52 Stat. 150–153). South Dakota, North Dakota, and Minnesota. Consent to compact relating to utilization of, control of floods of, and prevention of pollution of waters of the Red River of the North and tributary streams.

(6) Act of June 8, 1940 (54 Stat. 261, c. 295). Maine, New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia, and Florida. Consent of Congress to any two or more of the States named to negotiate compacts for regulation of fishing, etc., in the territorial waters of the Atlantic Ocean; subsequent approval by the legislatures of the signatory States and by Congress required. (See act of May 4, 1942, below.)

(7) Act of May 4, 1942 (56 Stat. 267–270). Atlantic States Marine Fisheries Compact. Consent and approval of compact, authorized by act of June 8, 1940, above, and ratified by Maine, New Hampshire, Massachusetts, Rhode Island, New York, New Jersey, Delaware, and Virginia, to be operative for not more than 15 years from May 4, 1942, for the better utiliza-

tion of the fisheries of the Atlantic seaboard. (See act of August 19, 1950, 64 Stat. 467, for amendment to compact.)

(8) Act of July 24, 1947 (61 Stat. 419–422). California, Oregon, and Washington. Consent to compact for better utilization of the fisheries of the Pacific coast.

(9) Act of July 31, 1947 (61 Stat. 682–685). Connecticut, Massachusetts, and Rhode Island. Consent to compact relating to control of pollution in waters of the New England States.

(10) Joint Resolution of May 19, 1949 (63 Stat. 70–73). Alabama, Florida, Louisiana, Mississippi, and Texas. Consent to compact relating to the better utilization of the fisheries of the gulf coast.

(11) Act of May 24, 1949 (63 Stat. 107, sec. 129). General. Consent to any two or more States to enter into compacts for cooperative effort and mutual assistance in the prevention of crime. (Amended August 3, 1956 (70 Stat. 1020).)

(12) Act of July 1, 1952 (66 Stat. 315–318). New York, New Jersey, and Pennsylvania. Consent to compact relating to mutual military aid in an emergency. (Amended June 4, 1956, 70 Stat. 247.)

(13) Act of June 6, 1953 (67 Stat. 45–52). Massachusetts, Connecticut, New Hampshire, and Vermont. Consent to compact for Connecticut River Flood Control.

(14) Joint resolution of April 22, 1954 (68 Stat. 59–62). District of Columbia and any State. Consent to negotiation of civil-defense compacts entered into between the District of Columbia and any State.

(15) Act of June 4, 1956 (70 Stat. 247). New York and New Jersey and any State sharing a common boundary. Amendment of act of July 1, 1952, so as to authorize consent, without submission to Con-

gress, of compacts relating to mutual military aid in an emergency.

(16) Act of July 9, 1956 (70 Stat. 498–499, sec. 3). General. Consent to compacts between two or more States for prevention and control of water pollution. Approval of Congress required for any such compacts entered into.

(17) Act of April 23, 1957 (71 Stat. 18–25). Massachusetts and New Hampshire. Consent and approval of Congress to the Merrimack River flood control compact.

(18) Act of August 28, 1957 (71 Stat. 466–467). Montana, North Dakota, South Dakota, and Wyoming. Consent to negotiate compact relating to interests of States in the development, protection from pollution, and use of water resources of the Little Missouri River and its tributaries.

(19) Act of September 2, 1958 (72 Stat. 1701; Public Law 75–877). Minnesota and Manitoba, Canada. Consent to State to enter into compact for development of a highway.

(20) Act of August 11, 1959 (73 Stat. 333; Public Law 86–154). General. Consent to the States to enter into compacts for the development or operation of airport facilities.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 391

UNITED STATES OF AMERICA,
Petitioner,

v.

AUSTIN J. TOBIN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

The petition for certiorari asks this Court to review a unanimous decision of the Court of Appeals for the District of Columbia Circuit which decided only a question as to the proper interpretation of a resolution of the House of Representatives. The resolution authorized the Judiciary Committee to investigate the "activities and operations" of interstate compacts.* It was intended for a single investigation relating to the compacts creating the Port of New York Authority. A Subcommittee of the Judiciary Committee sought to conduct an unlimited investigation into the Authority's internal administrative and decision-making processes, as well as its activities and operations, and issued

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* H. R. Res. 530, 86th Cong., 2d Sess. (1960).

a subpoena calling for virtually all the files of the Authority. On the return date of the subpoena the Chairman of the Subcommittee stated that the purpose of the investigation was to consider whether to "alter, amend, or repeal" the consent of the Congress to the compacts which created the Authority. No such purpose had been stated to the House or was referred to in the resolution. Nor had the House been advised that the Subcommittee intended to investigate the internal administration of the Authority.

The court below found that the authorizing resolution, fairly construed, was intended to authorize an investigation limited to actual activities and operations and that such construction would avoid adjudicating serious constitutional questions. Accordingly, the court held that the Authority had fully complied with all authorized demands of the subpoena when it voluntarily furnished seven crates of materials showing all the actual activities and operations of the Authority.

STATEMENT

Respondent, Executive Director of the Port of New York Authority (the Authority), is a career public servant, employed by the Authority for more than 34 years (R. 9). This criminal proceeding was brought because at a hearing of Subcommittee No. 5 of the House Judiciary Committee (the Subcommittee) Respondent, in obedience to the written instructions of the Governors of New York and New Jersey and the Authority's Board of Commissioners, declined to produce confidential work papers and other internal files called for by a Subcommittee subpoena.

The Authority was created by the States of New York and New Jersey for the purpose of acting as "an instrumentality or agency of the two States" to develop and coordinate the terminal and transportation facilities of the

Port of New York (Deft. Ex. A, pp. 7-22, 27-60). The Compacts establishing the Authority were consented to by Congress by two joint resolutions approved by the President on August 23, 1921 and July 1, 1922.*

The Authority consists of 12 Commissioners, 6 appointed by each Governor (R. 15). The powers, duties and responsibilities of the Authority are derived from and controlled by the two States and all the actions of the Authority are subject to veto by either Governor** (R. 18-21).

In March 1960, Congressman Celler, Chairman of both the House Judiciary Committee and the Subcommittee, directed the Committee staff to undertake a study of the Authority (R. 108). Over the ensuing 12-week period, the Authority voluntarily furnished the seven man investigating staff of the Subcommittee with voluminous documents showing its activities and operations. Files relating to its internal administration, however, were withheld pending a decision by the Governors. (R. 138, 142-50, 260-67)

On June 15, 1960 Respondent, the Chairman of the Authority's Board of Commissioners and the Secretary of the Authority were served with identical subpoenas (R. 154-55, 162-63, 172-73). The subpoenas contained no limitation on the period for which documents were to be produced, but were later restricted to a 14½ year period (R. 156, 164, 174). The scope of the subpoenas was so broad that compliance would have required the production of whole rooms full of documents and would have removed virtually all the files of the Authority. (R. 37, 39)

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* 42 Stat. 174 (1921); 42 Stat. 822 (1922).

** N. Y. Sess. Laws 1927, ch. 700, as amended, N. Y. Sess. Laws 1956, ch. 215; N. J. Rev. Stat. 32:2-6, -9 (1937).

The Action of the Governors.

On June 23, 1960, at a meeting of Governors Rockefeller and Meyner, the State Attorneys General, Commissioners of the Authority, Respondent and others, telegrams were prepared and sent by the Governors to all members of the Judiciary Committee requesting adjournment of the return date of the subpoena and

> "... an opportunity at a mutually convenient date to meet with the Judiciary Committee to present for your consideration the deep concern of our respective States over the grave questions of constitutional principle arising from Subcommittee 5 subpoena of internal memoranda, worksheets and other documents of our local port agency, the Port of New York Authority. Most serious questions of constitutional propriety are at stake, involving upon our parts the fundamental sovereignty of the States. I believe these issues of constitutional principle are so important that they should be the subject of thoughtful discussion and consideration between the Members of the Judiciary Committee and the Chief Executives of the two States." (R. 29, 279-80).

By reply telegram Chairman Celler rejected the request of the Governors for an adjournment of the subpoena return date and an opportunity to meet with the Committee (R. 281). By identical letters of June 25, 1960, the Governors instructed the Commissioners from their respective States to direct Respondent and the other Authority witnesses to renew, at the return date of the subpoena, the request for an adjournment and, if refused, to decline to produce the internal memoranda, worksheets and other internal materials called for by the subpoena (R. 187-91). Thereupon the Board of Commissioners met and formally directed Respondent to comply with the Governors' instructions (R. 278).

The June 29th Hearing.

On June 29, 1960, Respondent, Board Chairman Colt and the Authority's Secretary, accompanied by the Attorneys General of the two States and members of the Authority's legal staff, appeared at the hearing. The purpose of the investigation, as stated by the Chairman at the opening of the hearing and repeated by Subcommittee counsel after an objection of pertinency had been made, was as follows (R. 112-13, 204):

> "The purpose of the investigation is to ascertain conformance or non-conformance of the Port of New York Authority with the congressionally imposed limitations on its powers and the extent and adequacy with which the authority is carrying out its duties and responsibilities under the congressionally approved compacts *in order to determine whether Congress should legislate 'to alter, amend, or repeal,' its resolutions of approval.*"* (Emphasis supplied)

Respondent produced approximately seven packing cases of documents and offered to "answer any questions which the committee may choose to ask" relating to the stated purpose of the investigation (R. 34, 36, 199). However, Respondent and the other witnesses, acting in obedience to the instructions of the Governors and the Board, and objecting to the pertinency of the documents demanded, did not produce documents relating to the

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* Petitioner conceded in its brief in the District Court that this was the stated subject matter under investigation. The District Court, however, asserted a vastly broader subject matter in its opinion and on that basis convicted Respondent. In the Court of Appeals, Petitioner abandoned the subject matter stated to Respondent by Chairman Celler and adopted the District Court's expanded version. Petitioner is apparently prepared (fn. 5, p. 17) to advance a third and even broader subject matter in this Court. *Cf. Russell* v. *United States*, 369 U. S. 749, 759, 766-68 (1962).

internal administration of the Authority (R. 33, 187-91, 199-200).*

Chairman Celler ruled that each of the witnesses was in default and then, for the first time and as "a matter of grace", permitted the Attorneys General of the States and the General Counsel of the Authority to make statements (R. 216-17). They pleaded with the Subcommittee to afford the Governors an opportunity to be heard before ruling the witnesses in default. They pointed out the confidential nature of many of the documents demanded and the serious effect of the demand on the internal administrative affairs of the States and on the use of interstate compacts by states. They objected that with reasonable effort on both sides the matter could be satisfactorily adjusted. They urged that the Subcommittee, in the interest of preserving the balance of the federal system, avoid precipitating a clash of federal and state sovereignties. (R. 218-31, 238-41) Their pleas were summarily rejected; the Chairman ruled that "the judgment of default must stand and will not be deferred" (R. 222).

Later Proceedings.

On August 23, 1960, the House cited Respondent for contempt. On November 25, 1960, Petitioner initiated contempt proceedings against Respondent by filing an information in the District Court (R. 1-2). The information contains no statement whatever of the subject matter of the investigation and no charge that the documents demanded were pertinent.

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* Among the types of documents withheld were confidential reports of Respondent to the Commissioners, reports on private conversations with and views of the Governors, reports on the character and reputation of individuals and businesses, legal memoranda and opinions, documents containing tentative views and recommendations of the Authority's staff, salary forecasts and information on real estate in which the Authority might be interested (R. 36-44).

Respondent was tried by the District Court without a jury and, on June 15, 1961, was convicted.

The Court of Appeals for the District of Columbia Circuit unanimously reversed Respondent's conviction, holding that the Subcommittee had not been authorized by the House to conduct the investigation attempted. Petitioner filed a petition for rehearing of the appeal *en banc* which was denied on July 2, 1962.

REASONS FOR DENYING THE WRIT

The question decided by the court below is not of a character warranting review by this Court. Petitioner's arguments to the contrary are essentially the same as those it advanced in moving for a review by the full Court of Appeals of nine Judges, *en banc*.

I.

The fact that the House cited Respondent for contempt is not a ground for granting certiorari.

Petitioner, citing *United States* v. *Rumely*, 345 U. S. 41 (1953), seeks a writ here on the ground that the court below rejected the view of the Subcommittee's authority adopted by the House in citing Respondent for contempt. This action of the House was long after the original authorizing resolution and after Respondent's refusal to comply with the Subcommittee's demands. Actually, the *Rumely* case settled the irrelevance of such "*post litem motam*, self-serving declarations" and held that "Rumely's duty to answer must be judged as of the time of his refusal" (345 U. S. at pp. 47-48).

Since no contempt case can arise without a citation for contempt by the House or Senate, Petitioner is arguing,

in effect, that a writ of certiorari is automatic in every case where a contempt conviction is reversed. That there is no such rule is apparent from the fact that, after the *Rumely* decision, certiorari was denied in *Brewster* v. *United States*, 255 F. 2d 899 (D. C. Cir.), *cert. denied*, 358 U. S. 842 (1958), where the Court of Appeals had held an investigation invalid as exceeding the authorizing resolution although the Senate had issued a citation for contempt.

It is clear, therefore, that review by this Court of contempt of Congress cases is governed by the same considerations applied in other cases. These considerations demonstrate that review is not warranted here.

II.

The issues presented below are unlikely to arise in any other case.

This case is unique and dependent on its own peculiar facts and circumstances.

The history of this dispute is a history of individualized attack on the Authority. As Petitioner points out (p. 17), the authorizing resolution was obtained on the express assurance by its sponsors that it would be used only "to look into one particular State's compact". Petitioner has thus cut the ground from under its own argument that the decision below may affect investigations relating to other compacts or investigations not relating to a compact at all. Contrary to its contention (p. 14), this was an *ad hoc* resolution if ever there was one.

The resolution in question is not, as Petitioner contends (p. 14), a "continuing authorization of investigation". It was first adopted on June 1, 1960 during the 86th Congress and under the rules of the House had no continuing effect beyond the term of that Congress.* A similar resolution was

* 106 CONG. REC. 11593-94 (1960).

adopted by the 87th Congress prior to the decision of the District Court in this case.* Regardless of the outcome of this litigation, the resolution will expire at the end of this year and will not be in effect in the next Congress unless readopted.

Even if investigations of other interstate compact agencies should be undertaken, there is no reason to assume that the questions of Congressional power raised below would have to be resolved in the courts. Any such investigation would normally, and properly, be pursued under the enumerated powers, such as those relating to interstate commerce and national defense, to which all compact agencies as well as single-state agencies are subject, not by the extraordinary assertion of a power to amend or repeal a compact consent.** Moreover, it is not lightly to be supposed that the spirit of cooperation and reasonable adjustment of conflicting interests which has typified federal-state relations in the area of interstate compacts will not prevail. It is equally unlikely that the reasonable pleas of the Governors of states for an opportunity to meet with a Congressional committee to resolve such conflict will be refused.

In these circumstances, the decision below has relevance to this case alone. It establishes no "rule of continuing importance" (Pet. p. 12), but merely gives effect, in the circumstances of this unique case, to settled principles of construction giving legislative language its ordinary and natural meaning and preferring a fair construction which avoids constitutional questions to one which raises them.

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* H. R. Res. 56, 87th Cong., 1st Sess. (Feb. 9, 1961).

** As Respondent urged and the court below pointed out (Pet. App. A. pp. 33-34), with these plenary powers continuously available to it, Congress has abundant authority to prevent any activities of compact agencies from doing violence to areas of federal concern.

III.

The decision does not impede the exercise by Congress of its powers of investigation.

Petitioner's contention that the decision below will unduly burden and impede Congressional investigations has no substance or reality. Petitioner argues as though the court had actually decided a constitutional question of Congressional power. It did nothing of the sort. The court held nothing about the power of Congress to investigate, either under the Compact Clause or under the enumerated powers.* It merely found that the unlimited investigation attempted was not authorized.

In declining to decide the constitutional questions, the court followed the well established rule of judicial restraint.** The sole "burden" on Congress is that of using clear and unambiguous language in the authorizing resolution. What would truly be an impediment to the legislative function would be to decide far reaching challenges to Congressional power in an academic setting without any clear indication that the power had even been asserted by the Congress.

Petitioner argues (pp. 20, 24-25), however, that an unambiguous resolution would be difficult to draft. This

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* Referring to the constitutional doubt expressed by the court below, Petitioner contends (pp. 22-23) that this will somehow prevent Congress from informing itself as to the functions of other compact agencies. Petitioner reads more into the court's opinion than is there. The doubt related solely to an unusual investigation of unlimited extent by a Subcommittee asserting an alleged "implied" power to amend or repeal a compact clause consent. There was no question in the case as to the customary type of investigations by Congress pursuant to its enumerated powers for a legitimate legislative purpose.

** The rule is even more applicable to resolutions than to formal legislation. *Rumely* v. *United States*, 345 U. S. 41, 45-46 (1953).

alleged difficulty cannot be taken seriously. Congressional mastery of English is not so limited that the House could not easily express an intention to authorize the Committee to conduct what the petition itself characterizes (in language not contained in the resolution) as a probe of the "internal workings" of this bi-state agency. If the House wishes to override the construction placed on the resolution by the Court of Appeals, and to authorize the Subcommittee's unprecedented investigation regardless of the constitutional questions involved, it need only add a few words clearly indicating such intent. If "the pressure of other legislative business" prevents the House from doing so, as Petitioner suggests (p. 13), it can only be because the House is not interested in forwarding the kind of investigation upon which the Subcommittee embarked.

Obviously the resolution would not have to list "particular documents" (Pet. p. 20) and "every particular kind of evidence in specific detail" (Pet. p. 24). All that is necessary is to make clear the scope of the investigation. A subpoena for all evidence relevant to that investigation would then have been authorized.

Petitioner also states (p. 25) that the decision below results in "delay and uncertainty" as to the power of Congress to amend or repeal a compact consent. This is simply an expression of disagreement with the rule of judicial restraint which avoids unnecessary constitutional adjudication. Every rejection of an opportunity to decide a constitutional question results in delay in decision of that question and uncertainty as to its eventual resolution, but the wisdom of the rule has been firmly established by long experience.

The implication of Petitioner's argument is that the observations of the court below as to the power of Con-

gress to amend or repeal a compact consent will cause chaos and consternation in Congress. This is hardly likely. The Senate Judiciary Committee concluded four years ago that Congress has no power to amend or repeal consent to a compact, and its conclusion was buttressed by a formal opinion of the Attorney General of the United States to that effect.*

Finally, Petitioner argues (pp. 19, 21) that under the decision below any witness in an investigation of the operations of a compact agency is free to withhold information from Congress if he can present a "plausible argument" for narrowing the authorizing resolution. If this means that where the resolution is ambiguous and subject to a fair interpretation avoiding constitutional questions, a state official will not be sentenced to jail for adopting that interpretation, then the statement is correct. Under the court's decision here it can mean no more.

IV.

The decision of the Court of Appeals is clearly correct.

Petitioner cannot question these basic facts:

1. Never before has a committee of Congress attempted to conduct an investigation of unlimited scope and depth into the confidential work papers and internal administrative processes of a state agency.

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* S. Rep. No. 1367, 85th Cong., 2d Sess. 2, 18-19 (1958). See also Conference Report, *Statement of the Managers on the Part of the House*, H. R. Rep. No. 2234, 85th Cong., 2d Sess. 4 (1958). These Reports related to a boundary compact between Oregon and Washington. The Senate Report recommended deletion, as unconstitutional, of a purported reservation in the Congressional consent resolution of a right to alter, amend or repeal the consent.

2. There is not one line in the Congressional Record to indicate that prior to the adoption of H. R. Res. 530 on June 1, 1960 the House of Representatives was ever told anything about the scope of the contemplated investigation or that documents relating to the internal administrative processes of the Authority had been demanded and refused.

3. The investigation attempted was totally foreign to the traditional concern of the Judiciary Committee with interstate compacts.*

It was in the light of these indisputable facts that the court below interpreted the authorization to investigate "activities and operations" as meaning actual activities and operations and not internal administrative processes. In so holding the court declined to assume that a routine resolution, with no floor discussion apprising the House of the Subcommittee's contemplated actions, was intended to authorize an unprecedented investigation having the gravest implications for our federal form of government.

Petitioner, however, attacks the decision below as incorrect, advancing three grounds.

1. Petitioner argues (p. 15) that the investigation must be allowed to extend to the internal administration of the Authority because the authorizing resolution permits "full and complete" investigation. But "full and complete"

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* It is significant that in 1952, when a suggestion was made that the Judiciary Committee investigate the operations of the Authority, Chairman Celler himself concluded that "it is questionable whether this Committee would have jurisidiction" *Hearings on H. R. J. Res. 375 Before Subcommittee No. 5 of the House Committee on the Judiciary*, 82d Cong., 2d Sess. 10-11, 98 (1952) (Ward & Paul, Official Reporters).

investigation can only be of the subject authorized, "activities and operations". It cannot enlarge the subject.*

2. Next, Petitioner attempts to evade the court's finding, which it cannot dispute, that when the House adopted the resolution it was not informed as to the kind of investigation contemplated. Petitioner points (pp. 16-17) to a statement of Congressman Brown of the Rules Committee that the Committee had "had explained to it the need for this investigation". The Rules Committee is not the House. It is the House that must authorize the investigation, not the Rules Committee.

Thus, Petitioner asks this Court to sustain a conviction on the basis of a double inference—first, an inference that since the Rules Committee was told something, it must have been told all, and then an inference that whatever the Rules Committee knew the whole House must have known.

The closest thing to an explanation that was given the House (and, for all that appears, the Rules Committee) as to what the Subcommittee proposed to do was the statement by Congressman Brown that the Subcommittee would seek to find out "just how a great many public funds are being expended." 106 Cong. Rec. 11593 (1960). This reference to public funds would naturally be understood by the House to refer to federal funds, which were not involved in the Subcommittee's investigation. More than that, such a reference would not remotely suggest to the House that the Subcommittee intended to investigate the internal decisional processes of the Authority.

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* Petitioner's irrelevant observations (p. 15) as to what might be involved in an investigation relating to the "handling of claims under the Federal Torts Claims Act" merely point up the fact that if you assume a different kind of inquiry, a different legislative history, a different authorization, and a situation in which no state agency is involved and no constitutional question presented, you have a different case.

Petitioner also relies on an offhand remark by a single Congressman not focusing on the scope or depth of any particular investigation but merely reacting to the anxiety of a fellow Congressman as to what interstate compacts might be investigated. During the discussion, the Chairman of the Committee on Interstate and Foreign Commerce mentioned that his Committee had jurisdiction over certain compacts and asked Congressman Smith if H. R. Res. 530 was meant to refer to interstate compacts other than those coming within the jurisdiction of the Judiciary Committee. Congressman Smith's only reply was: "And they are given blanket authority to investigate". 106 Cong. Rec. 11594 (1960). Earlier in the discussion, Congressman Smith had made plain that nothing exceptional was intended by H. R. Res. 530, stating that "inadvertently the resolution [H. R. Res. 27, 86th Cong., 1st Sess., passed on January 27, 1959] failed to include one section of authority of the committee which was the section providing that it might have jurisdiction involving the activities and operations of interstate compacts." 106 Cong. Rec. 11593 (1960).*

It is beyond argument that when the House passed the authorizing resolution it was not told what the Subcommittee intended to do.

3. The petition assumes that the court's interpretation of the House resolution would have been different if no constitutional issues had been presented. There is no basis for the assumption. The court found that the natural meaning of the resolution, and the indicated intention of the House,

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* Moreover, the Committee's authorization to investigate, blanket or otherwise, was limited to "activities and operations." The court below took this to mean actual activities and operations, not internal cerebrations.

was to authorize an investigation of actual activities and operations, not thought processes and internal administration. The court concluded that the House would have been far more explicit had it intended to authorize an investigation so novel and without precedent as the one the Subcommittee attempted. The court was fortified in its conclusion by the fact that constitutional adjudication was avoided.

Petitioner argues (p. 20) that the rule of construction which avoids unnecessary constitutional adjudication applies only where the resolution is "constitutional under one interpretation and of doubtful constitutionality under the other". The argument is made that absence of power to amend or repeal compact consent would make the resolution unconstitutional under any interpretation. What Petitioner overlooks is that the resolution makes no mention of amendment or repeal of compact consent, but merely authorizes an investigation of activities and operations of interstate compacts. The constitutional question reserved by the court below had to do only with the legislative purpose asserted by the Subcommittee—amendment or repeal of the compact consent. This question was not inherent in the resolution but was introduced by what the Subcommittee attempted to do in its formal statement of purpose.

Furthermore, in construing a resolution in such a way as to avoid adjudicating constitutional questions in the case before it, a court need not reach out to determine for future cases the constitutionality of the resolution as construed. In the *Rumely* case, for example, this Court did not hold that one interpretation of the resolution involved was constitutional and another unconstitutional. As here, the Court held only that there was a serious constitutional question; that the Court should abstain from adjudication of the question "unless no choice is left" (345 U. S. at p. 46); and that the Court's interpretation avoided the necessity of such adjudication.

If, as Petitioner contends (p. 21), a determination of the power of Congress to alter or repeal a consent would have affected not only the power of the Subcommittee to demand the documents actually in issue but also its power to demand the many documents produced, there was even more reason to avoid premature constitutional adjudication. If Petitioner is asking the Court to decide the power of Congress to obtain documents of a character already produced by the Authority, it is in effect seeking an advisory opinion on an academic question not at issue in this criminal proceeding.

Finally, Petitioner entirely ignores a major additional constitutional issue referred to by the court below (Pet. App. A. p. 31). Respondent demonstrated that even if the Congress were held to have power to amend or repeal compact consent, an investigation of the internal administrative and decisional processes of a state agency would be barred by the Tenth Amendment. The construction given the resolution by the court below avoided this constitutional question. That construction, therefore, was appropriate even under Petitioner's mistaken statement of the rule of avoidance of constitutional questions.

V.

Reversal of Respondent's conviction would also be required on grounds not decided by the court below.

The insufficiency of the Subcommittee's authorization from the House was only one of numerous legal defects which required reversal of the conviction. Respondent demonstrated in the court below the following additional reasons why the conviction could not stand:

1. The attempted investigation of the Authority had no valid legislative purpose. The stated purpose

was to consider whether Congress should amend or repeal its consent to the Port Authority Compact. This the Congress has no constitutional power to do.

2. Even if Congress had the power to amend or repeal its consent to the Port Authority Compact, the Tenth Amendment would be a bar to a demand for documents relating to the internal administration of a State agency such as the Authority.* The need of Congress to be informed can be fully satisfied without intruding into State decisional and policy-formation processes.

3. The subpoenaed documents were not pertinent to the stated subject matter of the inquiry, and the Subcommittee's explanation to Respondent of their alleged pertinency fell far short of the indisputable clarity necessary for a conviction of criminal contempt. Petitioner demonstrated this below in a point-by-point analysis of the Subcommittee's demands and explanations.

4. Orders of the Governors of New York and New Jersey deprived Respondent of any legal authority to produce the subpoenaed documents. Therefore, Respondent did not "willfully make default" in obeying the orders of the Governors.

5. To hold a subordinate state official in criminal contempt in such circumstances would have the effect of transferring State executive power from the Governor to a subordinate, since the Governor could not even present the State's constitutional objections for a judicial determination unless he could persuade the subordinate to withhold documents at the risk of criminal prosecution. This, in itself, would violate the Tenth Amendment.**

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* The Authority is a state agency. This has been established by at least 16 cases from the lowest federal and state courts up to this Court. No case has ever held to the contrary.

** There has never been any suggestion of disobedience by the Governors of New York or New Jersey or the Authority to any court orders requiring compliance with the Subcommittee's demands.

6. Subject only to two inapplicable exceptions, the offense defined in the contempt statute does not include refusal to produce documents which would be privileged in a court of law.* Many of the documents refused by Respondent were so privileged.

7. Congressional action directed against the Authority merely because of its bi-state character, and applicable to no other state or bi-state agency, would violate the due process clause of the Fifth Amendment.

8. The subpoena issued by the Subcommittee was an unreasonable search in violation of the Fourth Amendment.

9. Respondent was deprived of the right to be informed of the nature and cause of the accusation against him in violation of the Sixth Amendment. The information charging Respondent with criminal contempt was fatally defective under *Russell* v. *United States*, 369 U. S. 749 (1962), since it contained no statement—not one word—as to the subject under inquiry.

The court below found no need to decide any of these additional questions in view of its finding that the Subcommittee lacked House authorization for its demands. In the event that a writ of certiorari should be granted, Respondent will urge affirmance of the decision of the court below on each of the grounds advanced by Respondent in that court.

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* 52 Stat. 942 (1938), 2 U. S. C. §§192, 193 (1958).

CONCLUSION

The petition for a writ of certiorari should be denied.

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